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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/824,688

04/14/2004

Christopher J. Sewall

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8069

7590

11/01/2006

Paul A. Fair
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EXAMINER

WHITE, EVERETT NMN

ART UNIT

PAPER NUMBER

1623

DATE MAILED: 11/01/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/824,688

Applicant(s)

SEWALL ET AL.

Examiner

Everett White

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 11 August 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-45 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-45 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 30 August 2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date <u>8/14/2006</u> . | 6) <input type="checkbox"/> Other: _____ |

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DETAILED ACTION

1. The amendment filed August 11, 2006 has been received, entered and carefully considered. The amendment affects the instant application accordingly:
 - (A) Claims 24-26, 43 and 44 have been amended;
 - (B) Comments regarding Office Action have been provided drawn to:
 - (I) 112, 2nd paragraph rejection, which has been withdrawn;
 - (II) nonstatutory double patenting rejection, which has been maintained for the reasons of record;
 - (III) 103(a) rejections, which have been maintained for the reasons of record.
2. Claims 1-45 are pending in the case.

Double Patenting

3. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

4. Claims 44 and 45 stand provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over Claims 1-17, 20, 21 and 23-27 of copending Application No. 10/824,793 in view of Guiseley (US Patent No.

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4,443,486) for the reasons disclosed on pages 2 and 3 of the Office Action mailed March 6, 2006.

5. Applicant's arguments filed August 11, 2006 have been fully considered but they are not persuasive. The Examiner acknowledges Applicants request that this rejection be held until such time as notice of patentable subject matter has been received in the applications. Applicants indicated that an appropriate terminal disclaimer will be filed at that time if necessary.

Claim Rejections - 35 USC § 103

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

7. Claims 1, 6, 7 and 28 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Guiseley (US Patent No. 4,443,486) for the reasons disclosed on pages 4 and 5 of the Office Action mailed March 6, 2006.

8. Applicant's arguments filed August 11, 2006 have been fully considered but they are not persuasive. Applicants argue against the rejection on the ground that the Guiseley patent recites carrageenan being used to stabilize chocolate milk under conditions (extreme shear stresses) without running the risk of gelation. This argument is not persuasive because the Guiseley patent does disclose conditions which are well known in the art wherein carrageenan is used to prepare pudding which results in a gel being produced (see column 1, 5th paragraph of the Guiseley patent).

Applicants also argue that the Guiseley patent does not disclose or suggest the gels of the present invention having a solids content of at least 40% and the low molecular weight carrageenan of the invention being present in an amount of at least 70% of all carrageenan present in the gel. This argument is not persuasive since the Guiseley patent discloses carrageenan having a viscosity of 5 to 20 mPa.s, which covers the viscosity values disclosed in the instant claims, which also suggests the solids content disclosed in the instant claims. Furthermore, the comparative viscosity values disclosed for the carrageenan composition in the instant claims and the Guiseley patent suggests similar amounts (70%) of carrageenan present in the compositions. Also, Applicants argument regarding the gelling temperature of the carrageenan is not persuasive since instant Claims 1, 6, 7 and 28 do not disclose the gelling temperature of the carrageenan. Accordingly, the rejection of Claims 1, 6, 7 and 28 under 35 U.S.C. 103(a) as being unpatentable over the Guiseley patent is maintained for the reasons of record.

9. Claims 2-5, 8-27, 29, 30-34, 44 and 45 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Guiseley (US Patent No. 4,443,486) as applied to Claims 1, 6, 7 and 28 above, and further in view of Gennadios (US Patent No. 6,214,376) for the reasons disclosed on pages 5-8 of the Office Action mailed March 6, 2006.

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10. Applicant's arguments filed August 11, 2006 have been fully considered but they are not persuasive. The arguments presented against the Guiseley patent in the current rejection are substantially the same as presented in the above rejection. Accordingly, the response to the arguments presented in the above rejection against the Guiseley patent is incorporated into the current rejection of the claims. Applicants also argue that nothing in Gennadios discloses or suggests that gels may in fact be formed by a carrageenan that has a viscosity of 5 to less than 10 cP at 75 °C when measured in a 0.10 molar aqueous sodium chloride solution containing 1.5% by weight of the carrageenan base on the weight of all components in the solution. This argument is not persuasive since the Gennadios patent is only cited to show that the subject matter presented in the dependent claims (see Claims 2-5, 8-27, 29, 30-34, 44 and 45) do not disclose information that would indicate allowable subject matter beyond the material disclosed in instant Claims 1, 6, 7 and 28. Accordingly, the rejection of Claims 2-5, 8-27, 29, 30-34, 44 and 45 under 35 U.S.C. 103(a) as being unpatentable over the Guiseley patent as applied to Claims 1, 6, 7 and 28 above, and further in view of the Gennadios patent is maintained for the reasons of record.

11. Claims 35-43 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Gennadios (US Patent No. 6,214,376) in view of Guiseley (US Patent No. 4,443,486) for the reasons disclosed on pages 8-10 of the Office Action mailed March 6, 2006.

12. Applicant's arguments filed August 11, 2006 have been fully considered but they are not persuasive. Applicants argue against the rejection on the ground that there is nothing about the references, in any order or combination, that discloses or suggests processes for making gels comprising a carrageenan that has a viscosity of 5 to less than 10 cP at 75 °C when measured in a 0.10 molar aqueous sodium chloride solution containing 1.5% by weight of the carrageenan based on the weight of all components in the solution. This argument is not persuasive since the Guiseley patent, as discussed above, discloses carrageenan having a viscosity of 5 to 20 mPa.s, which covers the viscosity values disclosed in the instant claims. Applicants also argue that the Guiseley patent discloses carrageenan under conditions that avoid the risk of gelation. This

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argument is not persuasive since the Guiseley patent does disclosed conditions which are well known in the art wherein carrageenan is used to prepare pudding which results in a gel being produced (see column 1, 5th paragraph of the Guiseley patent). Accordingly, the rejection of Claims 35-43 under 35 U.S.C. 103(a) as being unpatentable over the Gennadios patent in view of the Guiseley patent is maintained for the reasons of record.

Summary

13. All the claims are rejected.

Conclusion

14. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Examiner's Telephone Number, Fax Number, and Other Information

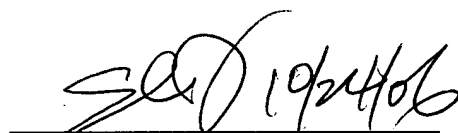
15. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Everett White whose telephone number is 571-272-0660. The examiner can normally be reached on 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Shaojia A. Jiang can be reached on 571-272-0627. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.


E. White


Shaojia A. Jiang
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